72-1427

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1427

AVELL C. WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No._____

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner, AVELL C. WILLIAMS, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 6, 1972.

OPINION BELOW

The opinion of the court below is reported at 470 F.2d 962. It appears as Appendix A herein. No written opinion was rendered by the United States District Court for the Southern District of California.

JURISDICTION

The judgment of the court below was entered December 6, 1972, affirming the Petitioner's conviction in the United States District Court for the Southern District of California for conspiracy and smuggling of heroin and cocaine in violation of 21 U.S.C. §§841(a)(1), 846, 952, 960 and 963. A timely Petition for Rehearing was denied on February 23, 1973, and is annexed hereto as Appendix B. Mr. Justice Douglas extended the time in which to file this Petition for Writ of Certiorari to and including

April 24, 1973, and this Petition is being filed in the time so allowed. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Petitioner's conviction for conspiracy and smuggling, without any proof in the record, deprived him of due process of law.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, Due Process clause:

"...nor shall any person...be deprived of his life, liberty or property, without due process of law...."

United States Constitution, Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a

speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The pertinent portions of 21 U.S.C. §§841(a)(1), 846, 952, 960 and 963 are set forth as Appendix C.

STATEMENT OF THE CASE

A. A four-count indictment charging Petitioner, AVELL C. WILLIAMS, and co-defendants, John H. Young, Grady Roger McLeod, Edward F. Barnett and Kenneth Jefferson in Count One with conspiracy

to import heroin and cocaine in violation of 21 U.S.C. §963, in Count Two with illegal importation of heroin and cocaine in violation of 21 U.S.C. §§952, 960 and 963, in Count Three with conspiracy to possess heroin and cocaine with intent to distribute them in violation of 21 U.S.C. §846, and in Count Four with possession of heroin and cocaine with intent to distribute them in violation of 21 U.S.C. §841(a)(1) was filed in the United States District Court for the Southern District of California on June 2, 1971. Each of the offenses allegedly occurred on or about May 22, 1971 and all involved a single transaction.

Petitioner was arraigned on the charges, and an omnibus hearing was set for him and his co-defendants. At the hearing, a motion for discovery of the

names and statements of the government's witnesses was granted. The cause was then transferred to a trial department where Petitioner entered a plea of not guilty to all the charges in the indictment and the case was continued for hearing of defense motions and further proceedings.

Motions to suppress the evidence, to sever the trial as to some defendants, to strike two counts of the indictment, for a Bill of Particulars, and for discovery of evidence including the names and statements of government witnesses as previously ordered at the omnibus hearing, were made by Petitioner and his co-defendants. Each of the motions was denied, except for the Bill of Particulars, with which the government complied by furnishing a report of the Los Angeles Police Department concerning the case.

The case was set for trial on November 16, 1971. At the time of trial it was first revealed by the government that it intended to call as a prosecution witness the co-defendant, Kenneth Jefferson. His case was severed from that of Petitioner and the remaining co-defendants for purposes of trial. The case then proceeded to a jury trial, with Jefferson testifying as the chief government witness.

Petitioner made appropriate motions for judgment of acquittal which were denied and the jury brought in a verdict of guilty on each count of the indictment. Petitioner's timely motion for a new trial was denied. Thereafter he was sentenced to three years imprisonment on each count, the sentences to run concurrently.

Petitioner duly appealed to the United States Court of Appeals for the Ninth

Circuit, which affirmed his conviction, disregarding, inter alia, the deprivation of his due process rights resulting from his conviction without evidence that he had knowingly conspired as charged in the indictment.

B. The evidence connected Petitioner with the alleged conspiracy only by proof of association. Officers of the Los Angeles Police Department testified that they were investigating "dope peddlers" and on May 21, 1971 set up a surveilance unit to observe Petitioner's residence. Early in the afternoon they saw a 1963 Ford Thunderbird pull into the driveway. Young, Barnett, and Jefferson started to work around the left door of the car. Petitioner, dressed in bed clothes, came out of his house, went to the garage and then over to the Thunderbird carrying an

extension cord and a power tool. He appeared to talk briefly with the men near the car. McLeod arrived, removed what appeared to be a Skil saw from the trunk of his car and joined the others near the Thunderbird. Petitioner went back into his residence and did not rejoin the group. The surveiling officers saw Barnett, Young, McLeod and Jefferson appear to drill and cut portions of the frame of the left front door of the Thunderbird. Petitioner at no time participated in the work.

After a short period of time the officers saw two of the men go to a department store and purchase a saw blade, then return to the Thunderbird and continue the work on the car. When the men were finished, McLeod left and Young, Barnett and Jefferson cleaned up the location.

Later the same day Jefferson and Barnett were observed driving the Thunderbird to Tijuana, Mexico. Customs officers were alerted and when the car re-entered the United States at the border it was stopped and searched. The officers discovered and seized 18 ounces of cocaine and 16 ounces of heroin which were secreted in a compartment cut into the floor on the left front side of the Thunderbird. All the parties were arrested--Jefferson and Barnett at the border, and Young, McLeod and Petitioner in Los Angeles. A search of a trash can located on Petitioner's property uncovered several items apparently left over from the work on the Thunderbird.

Kenneth Jefferson, the indicted co-conspirator, testified on behalf of the government that on May 21, 1971 he went

to Young's house in response to a call from Young. There, Young, in the presence of McLeod, asked Jefferson if he would use his Thunderbird to "make a run". Jefferson agreed to do so for $200. Young made two telephone calls to unidentified recipients. After the calls Jefferson, Young, McLeod and Barnett, who had arrived at Young's house, went to Petitioner's house. Jefferson drove the Thunderbird; Young and Barnett rode together in another car; and McLeod drove his own car. When McLeod arrived at Petitioner's house, he removed an electric saw from his automobile.

Jefferson testified that he, McLeod and Young worked on the car and that Barnett was present while the work was being done. His only testimony with

regard to Petitioner was that Petitioner came outside only once; brought a hand drill and an extension cord to the men; and stayed near the car a few minutes. Although Jefferson testified that Petitioner talked with the men, he related none of the conversation and gave no indication that Petitioner discussed any illegal activity with his alleged co-conspirators. Nor did Jefferson testify that Petitioner was present, overheard and must have understood a conversation among the men who were working in which someone said, concerning the compartment which was being cut in the car, that it would "make a good stash". Jefferson's only other referrence to Petitioner was his testimony that while the men were still working Petitioner put his head out the door of his residence and mentioned there was a

telephone call for someone, and went back into his house.

Jefferson testified that after the work on the car had been completed Young and Barnett arranged a trip to Tijuana with him. He and Barnett, together with his girlfriend, drove to Tijuana in the Thunderbird; picked up contraband; hid it in the newly-constructed compartment; and started back across the border into the United States.

The foregoing comprised all the testimonial evidence against Petitioner. Appropriate objections were made to the references to "dope peddlers" and to all conversations which took place out of Petitioner's presence and were offered without proof of his participation in the alleged conspiracy.

Over timely and appropriate objection the debris found in Petitioner's trash

can was admitted in evidence against him. The only other evidence against Petitioner, also admitted over objection, was a telephone bill in the name of Willie Mae Williams, for Petitioner' address, reflecting a telephone call made in the afternoon on May 21, 1971 from an unknown caller to a number identified only as being within the Tijuana area code. The bill reflected that the call had been protested by the customer and that an adjustment had been made by the telephone company.

REASONS FOR GRANTING THE WRIT

This court, in Thompson v. Louisville, 362 U.S. 199, 80 S.Ct. 624 (1960), a case involving an alleged violation of a minor misdemeanor, said, "Just as 'Conviction upon a charge not made would be sheer denial of due process,'

so is it a violation of due process to convict and punish a man without evidence of his guilt." (362 U.S. at 206). See also Garner v. Louisiana, 368 U.S. 157, 82 S.Ct. 248 (1961). The question here presented is whether a conviction for a reprehensible crime, which, just as in the Thompson case, is without any evidentiary support, is equally offensive to due process of law.

Petitioner was convicted of conspiracy and substantive crimes involving violations of the federal narcotic laws. Although he was charged with and convicted of smuggling offenses, he personally neither smuggled nor had possession of contraband. His conviction on all counts was based upon the notion that he had conspired with and aided and abetted others in a criminal venture.

1. There is not one shred of evidence that Petitioner committed the offenses charged, aided and abetted their commission, or conspired to commit them. His conviction is nothing but a determination of "guilt by association" arrived at in violation of all the decisions of this court and courts of appeals, which decisions were intended to prevent such a result.

The flagrant disregard of principles long accepted as fundamental to a fair trial and due process of law is apparent just from the Court of Appeals' statement of the evidence against Petitioner:

> "Evidence was presented by the government showing that Williams had more than a casual acquaintance with the co-conspirators; that Williams' house was the agreed meeting place where the 'stash' compartment was constructed; that Williams provided the others with a drill and stood close by talking with the others while part of the work on the car was being done; and that a call was

made from the Williams' residence to Tijuana on the afternoon of the smuggling venture." Appendix A, p.2.

Where is the proof that Petitioner conspired? The principles by which the question must be answered were enunciated by this court long ago. There must be proof of a corrupt agreement among the conspirators. "The gist of the offense ...is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy." United States v. Falcone, 311 U.S. 205, 210, 61 S.Ct. 204, 207 (1940). There must be proof that the alleged co-conspirator knew of the scheme. "Those having no knowledge of the conspiracy are not conspirators...." United States v. Falcone, supra, 311 U.S. at 210. Proof of the alleged co-conspirator's knowledge must be clear, not equivocal

(Direct Sales Company v. United States, 319 U.S. 703, 711, 63 S.Ct. 1265, 1269 (1943)] because it is often the only proof from which intent may be inferred. And, there must be proof that the alleged co-conspirator intentially entered into the agreement.

Where is the proof that Petitioner aided and abetted smuggling activities? Again, the principles of law are well established. There must be proof that the accused knew of the illegal activity and consciously participated in it. Nye & Nissen v. United States, 336 U.S. 613, 69 S.Ct. 766 (1949); United States v. Peoni, 100 F.2d 401 (2nd Cir. 1938). See also e.g., United States v. Camarillo, 431 F.2d 615 (9th Cir. 1970); United States v. Barber, 429 F.2d 1394 (3rd Cir. 1970); Bailey v. United States, 416 F.2d 1110 (D.C. Cir. 1969); United

States v. Varelli, 407 F.2d 735 (7th Cir. 1969).

Evidence of innocent association is not proof of aiding and abetting. Bailey v. United States, supra; Murray v. United States, 403 F.2d 694 (9th Cir. 1969); United States v. Paige, 324 F.2d 31 (4th Cir. 1963). "[M]ere presence at the scene of a crime even in the company of one or more principle wrong-doers, does not alone make an aider or abettor." United States v. Barber, supra, 429 F.2d at 1397. Mere presence at the scene of non-criminal activity, a fortiori, does not make an aider and abettor.

Clearly, the evidence in Petitioner's case completely fails to prove the requisite knowledge and intent. It is not proof, but the sheerest conjecture that Petitioner knew his co-defendants planned to engage in smuggling and that he

intentionally joined their scheme. United States v. Kelton, 446 F.2d 669 (8th Cir. 1971). It is pure speculation that he knew of their illegal activity and consciously associated himself with it. Cf., Ong Way Jong v. United States, 245 F.2d 392 (9th Cir. 1957). The court below pointed to no evidence that conversations regarding the "run" to Tijuana or the suitability of the Thunderbird panel for a "stash" were made in Petitioner's presence or that he knew of the conversations, because there is no such evidence. The court below pointed to no evidence that Petitioner knew of the type of work being done on the car, or of its purported suitability for smuggling, because there is no such evidence. The "proof" of Petitioner's guilt, by way of either conspiracy or aiding and abetting simply does not exist.

The decision below is contrary to myriad decisions of courts of appeals which have applied the settled principles of law to factual situations indistinguishable from Petitioner's. The conclusion in those cases, and the one which should be applied here, is that a conviction for association with criminals, absent proof of knowledge and intent, is a conviction for guilt by association. It is devoid of evidentiary support, it is violative of due process and it must be condemned. See e.g., United States v. Lowry, 456 F.2d 341 (5th Cir. 1972); United States v. Hernandez-Carreras, 451 F.2d 1315 (9th Cir. 1971); United States v. Camarillo, supra; United States v. Barber, supra; Bailey v. United States, supra; United States v. Varelli, supra; Murray v. United States, supra; Miller v. United

States, 382 F.2d 583 (9th Cir. 1967); United States v. Paige, supra; Brumbelow v. United States, 323 F.2d 703 (10th Cir. 1963); United States v. Bentvena, 319 F.2d 916 (2nd Cir. 1963); Daily v. United States, 282 F.2d 818 (9th Cir. 1960); Chavez v. United States, 275 F.2d 813 (9th Cir. 1960); Johnson v. United States, 195 F.2d 673 (8th Cir. 1952).

2. It is no longer open to question that proof beyond a reasonable doubt is a constitutionally required standard. In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970). The decision below impermissibly eliminates reasonable doubt from a determination of the guilt or innocence of the person accused of crime by association.

The evidence against Petitioner permitted two inferences. One is that he innocently allowed his acquaintances to

use his facilities to work on their car at his residence. Arguably, the other is that he willingly and intentionally participated in their plan illegally to import heroin and cocaine, (although the record seems not to support such a conclusion). There is no way rationally to choose the inference of guilt. Where two inferences are equally valid, and one points to innocence and the other to guilt, isn't the defendant entitled to the inference of innocence? If there is no reasonable basis for concluding that the evidence points to guilt rather than innocence, isn't there reasonable doubt as a matter of law? Cf., Miller v. United States, supra; Brumbelow v. United States, supra; Johnson v. United States, supra.

3. Errors in the admission of evidence contributed to Petitioner's conviction for "guilt by association" and

resulted in denial of a fair trial and due process of law.

(a) Hearsay statements of the alleged co-conspirators were admitted in evidence against Petitioner, over objection. Most significant was the testimony by Jefferson relating Young's offer of $200 for the use of his Thunderbird to "make a run"; Young's two telephone calls prior to going to Petitioner's house, one in which he told someone he would be over in a few minutes and the other in which he said to meet at Petitioner's house; and the general conversation at the car regarding its suitability for a "stash". All of the conversations were hearsay as to Petitioner, who was not present while they were taking place. All of them were admitted in evidence despite the fact that his knowledge of and participation in a conspiracy were never

established. The statements were not competent to prove that Petitioner knew of or had engaged in the conspiracy. Krulewitch v. United States, 336 U.S. 440, 69 S.Ct. 716 (1949). Since the statements were, nevertheless, used against Petitioner at the trial, they may well have persuaded the jury to reach its verdict based upon no admissible evidence that Petitioner had committed the crimes charged.

(b) A telephone bill reflecting a direct dial telephone call to Tijuana, Mexico on the afternoon of May 21, 1971, was admitted in evidence against Petitioner, over objection. The billing had been protested by the customer, and an adjustment had been made by the telephone company. There was no evidence identifying the caller (United States v. Lococo, 450 F.2d 1196 [9th Cir. 1971]) or the

recipient of the call. There was no evidence pertaining to the subject matter of the call. The telephone bill was consequently probative of nothing. But it created fertile ground for speculation that Petitioner had nefarious contact with Tijuana.

Surely, a trial in which virtually the only tangible evidence is material which can prove nothing but can arouse much sense of wrongdoing does not comport with concepts of a fair trial and due process of law.

(c) Petitioner was deprived of a fair trial because he was referred to by police officers as a dope peddler. Twice during the course of the trial this reference was made, once when an officer said he verified the associates of the "alleged peddlers" and the second time when an officer said his job was

investigating people who are in the business of selling dope. Once the statement was stricken; once it was not. There is little doubt that the remarks were inadmissible. Cf., United States v. Bussey, 432 F.2d 1330 (D.C. Cir. 1970). Motions for mistrial were made and denied. Merely striking the testimony could hardly cure the problem and not all of it was stricken. It could not help but imbed itself in the mind of the jury, and satisfy the jury that Petitioner was a dope peddler and an associate of dope peddlers. United States v. Clarke, 343 F.2d 90 (3rd Cir. 1965). Can it be fairly said that this was not the testimony which convinced the jury that Petitioner was guilty? There was nothing else in the record but such hints at "guilt by association."

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

ALAN SALTZMAN and
MARTHA GOLDIN

By: MARTHA GOLDIN

Attorneys for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOHN H. YOUNG, *Defendant-Appellant.*	No. 72-1652
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. GRADY ROGER McLEOD, *Defendant-Appellant.*	No. 72-1619
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. AVELL C. WILLIAMS, *Defendant-Appellant.*	No. 72-1620

[December 6, 1972]

Appeal from the United States District Court
for the Southern District of California

Before: ELY and TRASK, Circuit Judges, and
TALBOT SMITH, District Judge*

PER CURIAM:

Appellants were tried by a jury and convicted on four counts involving conspiracy and smuggling of heroin and cocaine in

*Honorable Talbot Smith, Senior United States District Judge, for the Eastern District of Michigan, sitting by designation.

violation of 21 U.S.C. §§ 841(a)(1), 846, 952, 960 and 963. We affirm.

Appellants McLeod and Williams contend the evidence was insufficient to support the convictions. In viewing the evidence in the light most favorable to the government, we cannot say that it was insufficient. *See Glasser v. United States*, 315 U.S. 60 (1942). McLeod was present when appellant Young offered to pay a co-conspirator Jefferson $200 to "make a run." Jefferson agreed. Thereafter, McLeod participated in helping to construct the "stash" compartment in the load car, providing the others with an electric saw from his own car. Williams claims to have been an innocent bystander who permitted his friends to work on their car in his driveway. Evidence was presented by the government showing that Williams had more than a casual acquaintance with the co-conspirators; that Williams' house was the agreed meeting place where the "stash" compartment was constructed; that Williams provided the others with a drill and stood close by talking with the others while part of the work on the car was being done; and that a call was made from the Williams' residence to Tijuana on the afternoon of the smuggling venture. On the basis of this evidence, the jury had sufficient support for a finding of guilt.

A second point raised by Williams claims error in admitting telephone records into evidence. Direct proof of his identity as the caller is not required. The circumstantial evidence connecting him with the calls was adequate foundation for admission of the telephone records against him. *United States v. Estrada*, 441 F.2d 873, 878 (9th Cir. 1971); *Carbo v. United States*, 314 F.2d 718, 743 (9th Cir. 1963), *cert. denied, sub nom. Palermo v. United States*, 377 U.S. 953 (1964).

Appellants claim they should have been provided a list of government witnesses prior to the day of the trial. The government, however, is not required to disclose the names of its witnesses. *United States v. Glass*, 421 F.2d 832 (9th Cir. 1969); *Rosenzweig v. United States*, 412 F.2d 844 (9th Cir. 1969).

Motions for a continuance are within the sound discretion of the trial judge. *United States v. Beaty*, No. 71-2852 (9th Cir. Aug. 11, 1972) (motion for a continuance to substitute counsel); *United States v. Harris*, 436 F.2d 775 (9th Cir. 1970) (motion

for a continuance to obtain witnesses); *United States v. Wheeler*, 434 F.2d 1195 (9th Cir. 1970) (motion for a continuance based on a lack of preparation). This court will not disturb the trial judge's denial of the motion for a continuance without a clear showing of abuse which does not appear here.

Finally, the challenged uncalled-for statements of the testifying government agents must be considered against the context of the entire trial record.[1] *Schoepflin v. United States*, 391 F.2d 390, 395 (9th Cir.), *cert. denied* 393 U.S. 865 (1968). Under that test the remarks cannot have had a substantial influence on the jury verdict in this case. The trial court's denial of motions for mistrial was not reversible error.

The judgment is affirmed.

[1]Asked what his duties were, Officer Hayes responded, "I investigate people who are in the business of selling dope." Officer Tusan, describing his surveillance, stated that he verified the residences of the defendants and then stated, "I also verified two other associates of the original names of the alleged peddlers."

The latter portion of the answer of Tusan was stricken upon motion and the jury was admonished to disregard it. There was no such motion made as to the statement of Officer Hayes.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
vs.	)	No. 72-1620
AVELL C. WILLIAMS,	)	O R D E R
Defendant-Appellant.	)	

Before: ELY and TRASK, Circuit Judges, and TALBOT SMITH, District Judge*

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Ely and Trask have voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable Talbot Smith, Senior United States District Judge, for the Eastern District of Michigan, sitting by designation.

APPENDIX C

21 U.S.C. §841(a)(1):

"Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance...."

21 U.S.C. §846:

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

21 U.S.C. §952:

"(a) It shall be unlawful to

import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter...."

21 U.S.C. §960:

"(a) Any person who--(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance...shall be punished as provided in subsection (b) of this section.

"(b) (1) In the case of a violation under subsection (a) of this section with respect to a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned

not more than fifteen years, or fined not more than $25,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment....

"(c) A special parole term imposed under this section or section 962 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. The special term

provided for in this section and in section 962 of this title is in addition to, and not in lieu of, any other parole provided for by law."

21 U.S.C. §963:

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1427

AVELL C. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the sufficiency of the evidence to support his conviction and the admissibility of certain evidence at trial.

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted, along with co-defendants John H. Young and Grady McLeod,[1] on four counts involving the smuggling of heroin and cocaine, and conspiracy, in violation of 21 U.S.C. 841(a)(1), 846, 952, 960, 963. He was sentenced to four concurrent terms of three years'

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[1] Young's petition for a writ of certiorari has been denied (No. 72-959, March 5, 1973) and McLeod's is pending (No. 72-6372, this Term).

imprisonment (Tr. 539).[2] The court of appeals affirmed *per curiam* (Pet. App. A.).

1. Petitioner contends that the evidence was insufficient to support his conviction. As the following facts reveal, however, there was clearly sufficient evidence for the jury to conclude that he was a part of a conspiracy to smuggle narcotics into the United States.

Willie Tusan, Jr., a narcotics investigator for the Los Angeles Police Department, began surveillance of petitioner and the other defendants in December of 1968, and observed them in the presence of each other prior to May 21, 1971 (Tr. 312-314). Kenneth Jefferson, a defendant and co-conspirator, testified that on May 21, 1971, he was called over to defendant John H. Young's house and, in the presence of defendant Grady McLeod, was offered $200 for the use of his car to "make a run" (Tr. 231-232). After he had agreed to the deal, Young made two telephone calls. He told the first person that he would be over in a few minutes, and he told the second person to meet him at petitioner's house. After the calls, Jefferson, Young, McLeod, and one Barnett, who had just arrived, drove over to petitioner's house (Tr. 232-234).

At petitioner's house, officers Tusan and Stirwalt had set up a surveillance. Upon arriving at petitioner's house, Jefferson parked his car in the driveway. Petitioner came out and brought a hand drill and an extension cord from his garage which he carried over to the left front door of Jefferson's car and gave to the other defendants. He conversed briefly with them before return-

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[2] "Tr." refers to the transcript of the proceedings below, a copy of which is a part of the record filed in this Court.

ing to the house (Tr. 235, 384-385). The others removed the kick plate from the left front door of the car and began making a secret compartment—a "stash" (Tr. 235-236). Petitioner came out of his house once, stood close to where the work was being done on the car, and talked with the other defendants (Tr. 237-238, 321-322). He also picked up a tool box which was lying on the ground, and took it into the house (Tr. 308-309). During the time the work was going on, the defendants talked about what a big kick plate it was, and that it would make a good stash (Tr. 236-237). Defendants Barnett and Jefferson each went into petitioner's house once during the time that the work was going on (Tr. 238).

The defendants completed the work and had all left petitioner's house by 2:30 or 3:00 p.m. (Tr. 326, 338, 381, 386, 391-396, 400, 427). At 3:24 p.m. a three-minute, direct dialed, station-to-station telephone call was placed from the telephone at petitioner's residence to Tijuana, Mexico (Tr. 454-456).

Later that night, Jefferson and Barnett went to Tijuana, picked up the heroin and cocaine, hid it in the recently built compartment in Jefferson's car, and returned to the United States where they were apprehended at the border by the waiting narcotics agents (Tr. 244-250).

The next afternoon, at about 1:00 or 2:00 p.m., petitioner was arrested and his house and yard were searched pursuant to a search warrant (Tr. 332-333). In a trash can 15 feet from petitioner's driveway, the officer found a Sears paper bag,[3] general purpose cut-

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[3] Defendants Young and Barnett had purchased a round circular carbide saw blade at Sears while work was in progress on the secret compartment (Tr. 323, 324, 430-432).

ting wheels, containers for these cutting wheels, several metal fragments, and a broken drill bit (Tr. 484-487, 492).

Petitioner contends that the evidence merely showed that he associated with the other defendants. On the contrary, it showed that he was a part of the plan to smuggle narcotics. He knew the other defendants prior to May 21, 1971, and he was told that they were coming over to his house on that day (Tr. 233-234). When they arrived, he went directly to his garage and brought out a hand drill, although they had not as yet had any chance to request it. Clearly, he knew why they were there before they arrived. For about 5 or 10 minutes (Tr. 290), he stood no more than a few feet from where they were working on the secret compartment, and he talked with them. It is unreasonable to believe that he did not know the intended use of the compartment. Added to this evidence is the fact that shortly after the other conspirators left his house, a long-distance phone call was made from petitioner's house to Tijuana, where two of the conspirators picked up the narcotics later that night. On the basis of this evidence, the jury had sufficient support for a finding of guilt.

2. Petitioner further contends that certain evidence was erroneously admitted at trial. He claims that the statements of the co-defendants were inadmissible hearsay as to him. However, the statements were made during the conspiracy and in furtherance thereof, and were admissible under the co-conspirator exception to the hearsay rule. *E.g., Dutton* v. *Evans,* 400 U.S. 74. The government need not prove the conspiracy before the statements may be admitted; the order of proof is entirely within the discretion of the trial court. *United States* v. *Knight,* 416 F. 2d 1181, 1185-1186 (C.A. 9);

Nelson v. *United States,* 415 F. 2d 483, 487 (C.A. 5), certiorari denied, 396 U.S. 1060; *United States* v. *American Radiator and Standard Sanitary Corp.,* 433 F. 2d 174, 195 (C.A. 3), certiorari denied, 401 U.S. 948.

The telephone bill, showing the long-distance call to Tijuana, was properly admitted in evidence. As the court below found, the circumstantial evidence connecting petitioner with the call was adequate foundation for its admission. The fact that it was made shortly after the secret compartment was completed, and that later that night the "run" was made to Tijuana, made the call relevant.

3. Petitioner's claim that two comments by narcotics agents during the trial were so prejudicial as to constitute reversible error is without merit. One statement was made by Officer Tusan in describing his background research on the defendants: "I also verified two other associates of the original names of the alleged peddlers" (Tr. 313). Young's attorney moved to strike the testimony, and the court struck the portion relating to the "alleged peddlers" and admonished the jury to disregard it (Tr. 313). Officer Tusan's reference to "alleged peddlers" was ambiguous, but even assuming he meant the defendants, there is nothing inaccurate or prejudicial in referring to defendants, who had been under surveillance, as "alleged peddlers." Moreover, the jury was admonished not to consider the remark.

The second statement was made by Officer Hayes in reply to a question concerning his duties: "I investigate people who are in the business of selling dope." (Tr. 430). He was referring to his duties in the abstract, and he did not refer to any of the defendants in particular. When this statement is considered in the context of his limited testimony and the entire trial record, it is clear

that the court below correctly concluded that his statement "cannot have had a substantial influence on the jury verdict in this case" (Pet. App. A-3). There is no reason for this Court to review that conclusion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

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